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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 BBK Tobacco & Foods LLP,

10 Plaintiff,

11 v.

12 Skunk Incorporated, et al.,

13 Defendants.  
14

No. CV-18-02332-PHX-JAT

**ORDER**

15 Pending before the Court are, among other motions, Plaintiff BBK Tobacco &  
16 Foods LLP's Motions for Orders Permitting Filing Under Seal (Doc. 277; Doc. 342),  
17 Renewed Motion for Permission to File Non-Electronic Exhibits (Doc. 289; Doc. 351),  
18 Motion for Order Permitting Filing Under Seal of the Unredacted Sealed Version of  
19 Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment and a Certain  
20 Exhibit Thereto (Doc. 334), Motion for Order Permitting Filing Under Seal of Defendants'  
21 Motion for Partial Summary Judgment and Certain Exhibits Thereto (Doc. 339), and  
22 Defendants Skunk, Inc. and Vatra, Inc.'s Motion for Order Permitting Filing Under Seal  
23 Exhibits T (ECF 349) & U (ECF 350) Filed by Plaintiff With Plaintiff's Opposition to  
24 Defendants' Motion for Partial Summary Judgment (Doc. 352).

25 **I. BACKGROUND**

26 The parties in this case have stipulated to a Protective Order with regard to  
27 information, documents, and other things produced or served, or otherwise disclosed in this  
28 action, which they allege involve trade secrets, including commercial and financial

1 information, for which special protection from public disclosure and from use for any other  
2 purpose other than prosecution of this action is warranted. (Doc. 136).

3 Consistent with the Protective Order, the parties have moved to seal documents cited  
4 in their motions for partial summary judgment, and the Court now rules.

## 5 **II. DISCUSSION**

### 6 **A. Motions to File Under Seal**

7 Because there is a strong presumption in favor of public access to court documents,  
8 a party seeking to seal a judicial record “bears the burden of overcoming this strong  
9 presumption by meeting the ‘compelling reasons’ standard.” *Kamakana v. City and County*  
10 *of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (internal citation omitted). This means  
11 “the party must articulate compelling reasons supported by specific factual findings that  
12 outweigh the general history of access and the public policies favoring disclosure.” *Id.* at  
13 1178–79 (internal quotations omitted). These compelling reasons must be shown in order  
14 to seal judicial records attached to a dispositive motion, even if the dispositive motion, or  
15 its attachments, were previously filed under seal or protective order. *Id.* at 1179.

16 After conscientiously balancing the competing interests of the public and the party  
17 who seeks to keep certain judicial records secret, “if the court decides to seal certain judicial  
18 records, it must base its decision on a compelling reason and articulate the factual basis for  
19 its ruling, without relying on hypothesis or conjecture.” *Id.* (internal quotations omitted).  
20 Where a party shows that its documents contain sources of business information that might  
21 harm its competitive standing, the need for public access to the records is lessened. *See*  
22 *Nixon v. Warner Comm’ns, Inc.*, 435 U.S. 589, 598 (1978).

#### 23 **1. Doc. 277**

24 In its first motion, Plaintiff moves to file under seal two exhibits that are referenced  
25 in its motion for partial summary judgment, namely Exhibits 9 and 57. Defendants have  
26 not filed an opposition to the motion.

27 Exhibit 9 is a collection of invoices to several of Plaintiff’s customers. These  
28 invoices contain the customers’ names and addresses, as well as wholesale pricing

1 information. The invoices also list the types and volume of products sold. Exhibit 57  
2 contains a list of customers to whom Plaintiff sold its “Skunk Sack” products, the date of  
3 each sale, the price at which the product was sold, and calculation of total sales revenues  
4 by month between November 2014 and November 2019.

5 Plaintiff’s motion references a declaration of Brendan Mahoney to provide a factual  
6 basis for why public disclosure of these exhibits would cause it competitive harm. The  
7 motion, however, does not include Mahoney’s declaration as an attachment. It instead  
8 includes a declaration of Plaintiff’s creative director, Ian Kobe, and other exhibits unrelated  
9 to the subject matter of the motion to seal. Absent Mahoney’s declaration or other  
10 supporting exhibits, the Court is unable to make the factual findings necessary to determine  
11 whether compelling circumstances exist to justify sealing these exhibits.

12 The Court assumes this was an oversight on the part of Plaintiff’s counsel.  
13 Accordingly, rather than deny the motion, the Court will allow Plaintiff to file Mahoney’s  
14 declaration within three days of this Order. Until then, the motion shall remain pending.

## 15 **2. Doc. 334**

16 Next, BBK moves to seal the unredacted version of Defendants’ opposition to its  
17 motion for partial summary judgment and Exhibit BBBB, the source for the redacted  
18 statements in the publicly-filed opposition.

19 Exhibit BBBB contains Plaintiff’s total sales revenues from its Skunk brand  
20 products for 2012–18 and the period between January and October 2019 and breaks that  
21 information down by product. In support of its motion to seal, Plaintiff offers the  
22 declaration of its chief operating officer, Matthew Colvard. (Doc. 334-1). Colvard asserts  
23 that public disclosure of this secret information would harm Plaintiff by allowing its  
24 competitors insights into the sales trends of its products and categories of products. The  
25 Court agrees and finds that public disclosure of this information would result in a  
26 competitive disadvantage to Plaintiff that outweighs the policy in favor of public  
27 disclosure. Accordingly, the Court grants Plaintiff’s motion to file Exhibit BBBB under  
28 seal.

1 Further, Defendants have publicly filed a redacted opposition to Plaintiff's motion  
2 for partial summary judgment. (Doc. 332). The redacted motion contains only two redacted  
3 sentences, and both describe the contents of Exhibit BBBB. Because these limited  
4 redactions protect Plaintiff from competitive harm while respecting the public interest in  
5 access to Court documents, the Court grants Plaintiff's motion to file Defendants'  
6 unredacted opposition under seal.

### 7 **3. Doc. 339**

8 Next, BBK moves to seal the unredacted version of Defendants' motion for partial  
9 summary judgment and to seal the exhibits which the redacted portions of the publicly-  
10 filed motion cite, namely Exhibits 3, 4, 6, 9, 17, 18, 35, and 53. The parties have since  
11 agreed that certain redactions in the publicly-filed motion were unnecessary. (*See* Doc.  
12 340). Further, the parties agreed the parts citing page 145 of Exhibit 4 and page 273 of  
13 Exhibit 6 do not contain information justifying filing under seal. Defendants have publicly  
14 filed those pages from Exhibits 4 and 6, as well as a motion with unnecessary redactions  
15 removed. (Doc. 340-1; Doc. 340-2; Doc. 340-3). The Court addresses the remaining  
16 exhibits below.

17 Exhibit 3 consists of two pages of the opening report from Plaintiff's damages  
18 expert. These two pages discuss Plaintiff's marketing and sales strategy, as well as its  
19 annual marketing expenses by category and income from each sales channel. Plaintiff  
20 argues that public disclosure of this information would result in competitive harm because  
21 it would allow its competitors to conduct a sales trend analysis by year and by product. It  
22 further argues that marketing budget allocation is an aspect of its business strategy entitled  
23 to protection from public disclosure. The Court agrees and finds that public disclosure of  
24 this information would cause Plaintiff competitive harm that outweighs the policy in favor  
25 of public disclosure. Accordingly, the Court grants Plaintiff's motion to file these pages  
26 under seal.

27 Exhibit 4 consists of excerpts from Colvard's deposition. The excerpts have been  
28 filed publicly with four pages redacted. (Doc. 337-2 at 21–63). Plaintiff requests those four

1 pages (pages 120, 144, and 221–22) be filed under seal.

- 2 • Page 120: Plaintiff argues that Page 120 should be sealed because it indicates  
3 future product development plans and identifies one of its customers.  
4 Regarding the information Plaintiff characterizes as indicating future plans,  
5 the Court denies the motion. During the deposition, Colvard was asked  
6 whether Plaintiff used certain brand names on items other than those he was  
7 shown. Plaintiff asserts that Colvard’s answer describes Plaintiff’s plans to  
8 expand its product line. The Court disagrees. Colvard was asked a question  
9 calling for an either affirmative or negative response and responded in the  
10 negative. Plaintiff’s extrapolation of Colvard’s specific word choice is too  
11 speculative to constitute a compelling circumstance justifying removing the  
12 information from public view. And Plaintiff’s naked assertion that release of  
13 this information would cause it competitive harm is insufficient to make the  
14 required showing. The Court finds, however, that the information regarding  
15 the identity of Plaintiff’s customer may be sealed (lines 23–25 of page 120).  
16 BBK asserts that it keeps its customer identities secret, and the Court finds  
17 that release of this information would cause Plaintiff competitive harm that  
18 outweighs the policy in favor of public disclosure. *See B2B CFO Partners,*  
19 *LLC v. Kaufman*, No. CV 09-2158-PHX-JAT, 2011 WL 6297930, at \*3 (D.  
20 Ariz. Dec. 16, 2011) (“[C]ustomer lists may constitute trade secrets if  
21 competitors could not readily ascertain customer names from public or other  
22 proper sources and if reasonable efforts are made to maintain the secrecy of  
23 the lists.”). Accordingly, the Court grants Plaintiff’s motion with respect  
24 customer identity and denies the motion with respect to Colvard’s statement  
25 regarding the usage of the brands. Defendants shall publicly file Page 120 of  
26 Exhibit 4 with only lines 23–25 redacted.
- 27 • Page 144: This page of testimony discusses Plaintiff’s customers and its  
28 marketing strategy, which it maintains as confidential. The Court finds that

1 public disclosure of this information would cause Plaintiff competitive harm  
 2 that outweighs the policy in favor of public disclosure and therefore grants  
 3 the motion. *See id.*; *Baker v. SeaWorld Entmt, Inc.*, No. 14CV2129-MMA  
 4 (AGS), 2017 WL 5029612, at \*5 (S.D. Cal. Nov. 3, 2017) (finding it  
 5 appropriate to maintain under seal information related to “pricing and  
 6 marketing strategies” because “disclosure . . . could lead to an improper use  
 7 by competitors”). Because page 144 in its entirety discusses these topics, the  
 8 Court grants Plaintiff’s motion to seal the full page.

- 9 • Pages 221–22: Plaintiff argues that these pages should be sealed because they  
 10 identify its customers by name. Page 221, however, does not specifically  
 11 name any customers. Rather, it simply refers generally to a list of Plaintiff’s  
 12 customers, and Plaintiff does not argue that it would experience competitive  
 13 harm from its competitors knowing that a list of Plaintiff’s customers exists.  
 14 Accordingly, the Court denies the motion to seal page 221. A portion of page  
 15 222, however, does identify specific customers by name. The Court finds that  
 16 public disclosure of this information would result in competitive harm to  
 17 Plaintiff that outweighs the policy in favor of public disclosure and therefore  
 18 allows lines 9–25 of page 222 to be sealed. *See B2B CFO Partners*, 2011  
 19 WL 6297930, at \*3. Defendants shall publicly file Page 221 of Exhibit 4 and  
 20 Page 222 with only lines 9–25 redacted.

21 Exhibit 6 contains two pages of testimony from another deposition of Colvard.  
 22 Plaintiff moves to seal page 272 of the exhibit because it summarizes the information its  
 23 damages expert provided in Exhibit 3. For the reasons the Court grants the motion to seal  
 24 Exhibit 3, the Court agrees that sealing the summary of the information in Colvard’s  
 25 deposition is appropriate, specifically, lines 6–8 of page 272. Defendants shall publicly file  
 26 Page 272 of Exhibit 6 with only lines 6–8 redacted.

27 Exhibit 9 is the same as Exhibit BBBB discussed in section II(A)(2) of this Order,  
 28 *supra*. For the reasons stated above, the motion to seal this exhibit is granted.

1 Exhibit 17 is a list of products Plaintiff sold between 2011 and 2019, their wholesale  
2 price, and total sales. Plaintiff asserts that this information is maintained as confidential.  
3 The Court finds that public disclosure of this information will result in competitive harm  
4 to Plaintiff that outweighs the policy in favor of public disclosure. *See id.* at \*3 (“The Court  
5 finds that disclosure of . . . customer invoices could harm Defendants’ competitive standing  
6 because it would give competitors the ability to directly undercut Defendants’ pricing and  
7 thereby win clients away from Defendant.”).

8 Exhibit 18 is a copy of an invoice related to a trade show. Plaintiff argues that this  
9 exhibit should be sealed because it lists pricing information and “aspects of [its] marketing  
10 strategy for a particular trade show.” (Doc. 339 at 8). As discussed above, the Court finds  
11 that public disclosure of Plaintiff’s pricing information would cause Plaintiff competitive  
12 harm that outweighs the policy in favor of public disclosure and agrees that this information  
13 may be redacted. *See id.* Plaintiff, however, does not explain how the items listed in the  
14 invoice reveal aspects of its marketing strategy; it simply asserts that it does. Further, the  
15 trade show to which this invoice is related occurred in 2017. Even assuming Plaintiff’s  
16 statement to be true, Plaintiff does not assert that it uses the same strategy for every trade  
17 show or that it intends to use the same strategy going forward. Accordingly, Plaintiff has  
18 failed to demonstrate a potential for competitive harm and, consequently, failed to show  
19 compelling circumstance justifying sealing the document in its entirety. Defendants shall  
20 publicly file Exhibit 18 with only the pricing information redacted.

21 Exhibit 35 contains the responding report of Defendants’ damages expert. A copy  
22 of this report with redactions has also been filed in the public record. (Doc. 337-4 at 5–19).  
23 The publicly-filed report contains only two redactions, and Plaintiff seeks to file the  
24 unredacted report under seal. Both redacted statements summarize information discussed  
25 in Section II(A)(3) of this Order, *supra*. For the reasons stated above, the Court agrees that  
26 redaction of this information is appropriate. Because a version of the report with this  
27 information redacted has already been filed in the public record, the Court grants Plaintiff’s  
28 request to file Exhibit 35 under seal.



Exhibit 53 contains a list of Plaintiff's customers, which Plaintiff asserts it maintains as confidential. The Court finds that public disclosure of this information would cause competitive harm to Plaintiff that outweighs the policy in favor of public disclosure. *See B2B CFO Partners*, 2011 WL 6297930, at \*3. Accordingly, the Court grants Plaintiff's motion to file this exhibit under seal.

#### 4. Doc. 342

Plaintiff also moves to seal exhibits cited in its opposition to Defendants' motion for partial summary judgment, namely Exhibits F, Q, II, RR, and SS. Defendants have not filed an opposition.

Exhibit F is a one-page excerpt from a deposition of Plaintiff's owner, Joshua Kesselman. On several lines of this page, Kesselman discusses one of Plaintiff's brands that is not at issue in this case. Plaintiff has already filed a redacted copy of this page in the public record. (Doc. 341-7 at 21). The Court agrees with Plaintiff that the redacted information "is not necessary to the Court's consideration of the underlying motion." (Doc. 342 at 2). Because the unredacted document is unnecessary, it does not need to be in the record at all, and the Court, therefore, denies the motion to file the exhibit under seal.

Exhibit Q is a table showing the common retailers at which the parties' products are sold. Because this summary exhibit contains a list of Plaintiff's customers, which Plaintiff asserts it maintains as confidential, the Court finds that public disclosure of this information would cause competitive harm to Plaintiff that outweighs the policy in favor of public disclosure. *See id.* Accordingly, the Court grants Plaintiff's motion to file this exhibit under seal.

Exhibit II is a copy of an invoice to one of Plaintiff's customers that includes the customer's name, the items the customer purchased, and the wholesale price. As discussed above, Plaintiff asserts that its customer identities and wholesale prices are kept secret, and the Court finds that public disclosure of this information would cause Plaintiff competitive harm that outweighs the policy in favor of public disclosure. *See id.* Accordingly, the Court grants the motion to seal this exhibit.



Exhibit RR is a summary exhibit showing the volume of Skunk brand product sales since 2011 broken down by years, and Exhibit SS is a summary exhibit showing the total revenue Plaintiff earned over many years from distributor and retailer sales. According to the declaration of Plaintiff's general counsel, Plaintiff protects this information from disclosure to its competitors. Plaintiff argues that both these exhibits should be sealed because public disclosure of this confidential business information would reveal sales trends with respect to one of its brands that could be exploited by one of its competitors. Plaintiff further argues that this sales information has little relation to the subject matter of this case. The Court agrees and finds that public disclosure of this information would cause Plaintiff competitive harm that outweighs the policy in favor of public disclosure. Accordingly, the Court grants the motion to seal Exhibits RR and SS.

## **5. Doc. 352**

Finally, Defendants move to seal two exhibits that Plaintiff cites in its opposition to Defendants' motion for partial summary judgment and lodged under seal: Exhibits T and U.

Both exhibits are lists of Defendants' customers. According to the declaration of Defendants' owner, Alise Jusic, Defendants have maintained these customer lists for the past six years, and the company has treated these lists with the highest level of secrecy. (Doc. 352-1 at 3). Only two of Defendants' employees have had access to these records, and the files were password protected. (*Id.*). The Court finds that public disclosure of Defendants' customer lists would result in a competitive disadvantage that outweighs the policy in favor of public disclosure. *See id.* Accordingly, the Court grants Defendants' motion to seal Exhibits T and U.

## **B. Motion to File Non-Electronic Exhibits**

Plaintiff moved to file four non-electronic exhibits: (1) a video of Plaintiff's booth at a trade show, (2) an animated YouTube video promoting Defendants' Skunk bags, (3) a video showing Tommy Chong promoting Defendants' Skunk bags, and (4) a video showing Defendants' Skunk tent being relocated during an outdoor trade show event. (Doc.

1 289).

2 On August 30, 2020, the Court noted that it was inclined to deny the motion  
3 “because Plaintiff has refused to meet and confer with Defendants and because Plaintiff  
4 filed this request so late it deprived Defendants of any opportunity to respond.” (Doc. 290).  
5 The Court, however, considered the merits of the motion, denied the motion as to videos  
6 (1) and (4), and took the motion under advisement as to videos (2) and (3) pending further  
7 briefing. (*Id.*). The Court specifically stated that “[a]ny reply in support of the motion to  
8 file non-electronically must explain what is gained by viewing the videos, rather than still  
9 photographs of the product in the videos and the certified transcript.” (*Id.* at 2).

10 Defendants did not respond to the motion. On September 23, 2020, Plaintiff filed a  
11 notice informing the Court that the time for Defendants to file a response to its motion had  
12 passed. (Doc. 351). The notice also stated that “Plaintiff believes that the Court gains  
13 valuable context of the visual information depicted in the native marketing videos that it  
14 cannot obtain from just viewing stills of the videos and certified transcripts.” (*Id.*).<sup>1</sup>

15 The Court now denies Plaintiff’s request to file videos (2) and (3). Plaintiff has not  
16 demonstrated the need for the videos themselves rather than still photographs and a  
17 certified transcript. Despite Plaintiff’s stated belief, Plaintiff does not explain the nature of  
18 the context or visual information the Court stands to gain from the videos and does not  
19 explain how that information would differ from a photograph and certified transcript, as  
20 ordered by the Court. Nor does it not appear that Plaintiff attempted to propose a mutually-  
21 agreeable description of the videos to Defendants. Plaintiff instead only states that  
22 Defendants did not provide a suggested description. (Doc. 351 at 3).

23 Accordingly, the motion is denied.

### 24 **III. CONCLUSION**

25 For the foregoing reasons,

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27 <sup>1</sup> On October 7, 2020, Defendants filed a response to Plaintiff’s notice (Doc. 361), and on  
28 October 9, 2020, Plaintiff filed a reply asking the Court to strike Defendants’ response as  
untimely (Doc. 362). Because the Court would deny Plaintiff’s request to file non-  
electronic exhibits without considering Defendants’ response, the Court determines that  
striking the response is unnecessary.

1           **IT IS ORDERED** that Plaintiff's Motion for Order Permitting Filing Under Seal  
2 (Doc. 277) shall remain pending.

3           **IT IS FURTHER ORDERED** that Plaintiff's Renewed Motion for Permission to  
4 File Non-Electronic Exhibits (Doc. 289 and Doc. 351) is **DENIED**.

5           **IT IS FURTHER ORDERED** that Plaintiff's Motion for Order Permitting Filing  
6 Under Seal of the Unredacted Sealed Version of Defendants' Opposition to Plaintiff's  
7 Motion for Partial Summary Judgment and a Certain Exhibit Thereto (Doc. 334) is  
8 **GRANTED**.

9           The Clerk of the Court shall file under seal the unredacted version of Defendants'  
10 opposition to Plaintiff's motion for partial summary judgment (currently lodged at Doc.  
11 333) and Exhibit BBBB (currently lodged at Doc. 333-1).

12           **IT IS FURTHER ORDERED** that Plaintiff's Motion for Order Permitting Filing  
13 Under Seal of Defendants' Motion for Partial Summary Judgment and Certain Exhibits  
14 Thereto (Doc. 339) is **GRANTED IN PART AND DENIED IN PART**.

15           The Clerk of the Court shall leave all of Doc. 338, including attachments, lodged  
16 under seal and shall not file it into the record. Within 7 days, Defendants shall file under  
17 seal Defendants' unredacted motion for partial summary judgment (currently lodged at  
18 Doc. 338), Exhibit 3 (currently lodged at Doc. 338-1), Exhibit 9 (currently lodged at Doc.  
19 338-4), Exhibit 17 (currently lodged at Doc. 338-5), Exhibit 35 (currently lodged at Doc.  
20 338-7), and Exhibit 53 (currently lodged at Doc. 338-8). As to the remaining exhibits, the  
21 motion to file the exhibits in their entirety under seal is denied; within 7 days, Defendants  
22 shall file redacted versions as specified in this Order, and to the extent that Defendants'  
23 publicly-filed motion for partial summary judgment contains redactions deemed  
24 unnecessary by this Order, Defendants shall publicly-file an updated motion that is  
25 redacted consistent with this Order.

26           **IT IS FURTHER ORDERED** that Plaintiff's Motion for Order Permitting Filing  
27 Under Seal (Doc. 342) is **GRANTED IN PART AND DENIED IN PART**.

28           The Clerk of the Court shall file under seal Exhibit Q (currently lodged at Doc. 344),

1 Exhibit II (currently lodged at Doc. 345), Exhibit RR (currently lodged at Doc. 346), and  
2 Exhibit SS (currently lodged at Doc. 347). Exhibit F (currently lodged at Doc. 343) is  
3 stricken from the record, but may remain lodged under seal.

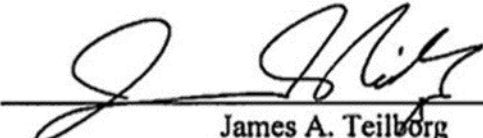
4 **IT IS FURTHER ORDERED** that Defendants' Motion for Order Permitting Filing  
5 Under Seal Exhibits T (ECF 349) & U (ECF 350) Filed by Plaintiff with Plaintiff's  
6 Opposition to Defendants' Motion for Partial Summary Judgment (Doc. 352) is  
7 **GRANTED.**

8 The Clerk of the Court shall file under seal Exhibit T (currently lodged at Doc. 349)  
9 and Exhibit U (currently lodged at Doc. 350).

10 **IT IS FINALLY ORDERED** that nothing in this Order impacts the use of exhibits  
11 at trial (should the case proceed to trial). The Court will not seal the trial or any portion  
12 thereof. Anything admitted at trial will be public with respect to the jurors, trial  
13 participants, and any member of the public in the gallery. The parties should confer and  
14 attempt to eliminate highly confidential information from their exhibit lists. But if this  
15 cannot be accomplished, the information will become public once admitted at trial.

16 Dated this 24th day of November, 2020.

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James A. Teilborg  
Senior United States District Judge